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Eddie Hoogland v. Thomas B. Child et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

EDDIE HOOGLAND,
by his Guardian ad Litem,
Roelof Hoogland,
Plaintiff and Appellant,

— vs. —

THOMAS B. CHILD and
C. W. CHILD,
dba THOMAS B.CHILD & CO.;
JACK ALDER and ROBERT R.
CHILD, dba ALDER-CHILD
CONSTRUCTION CO.
Defendants and Respondents.

Case
No. 9295

APPELLANT'S BRIEF

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Plaintiff and Appellant

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

This is an action brought by the Guardian of the plaintiff, Eddie Hoogland, a minor, for injuries resulting in the amputation of both of his legs, and other permanent injuries when an explosive compound, which was stored on the property of the defendants, blew up.

The defendant, Thomas B. Child, is the owner of property located at 452 South 8th East Street, Salt Lake City, Utah. This property had for many years been a place of curiosity due to the fact that this defendant had carved large figures and statues from stone which were arranged about the yard, many weighing as much as 25 to 40 tons. (See Deposition, Thomas B. Child, pp. 23, 24 and 25.) These premises were a great curiosity and operated in the nature of a park. No effort was ever made to secure the gate leading into the property, and the defendant was aware that children frequented the yard. (See Deposition, Thomas B. Child, p. 23, lines 3-14; p. 26, lines 3-26.)

> "Q. And people have come from all over the area who were curious to see this work and try to figure out what you were driving at, isn't that true?
>
> A. Yes.
>
> Q. And the gates were open, and the people come in, and the people look, isn't that true?
>
> A. Yes." (Deposition, Thomas B. Child, pp. 25-26.)

The property was used so frequently as a playground by the children in the neighborhood that it kept the defendant quite busy attempting to restrict the play, and though he advised the children that they had no right in the yard, yet the defendant made no effort to secure the property so that the children could not make a playground of it. (See Deposition, Thomas B. Child, p. 26.)

In the yard, pursuant to agreement with Thomas B.

Child, the defendants, Alder-Child Construction Co., and Thomas B. Child, stored various materials used in the construction business, including dangerous acids and other compounds. In the yard was a shed which could be locked, but nevertheless the acids and other compounds were kept outside in the yard where children playing could have ready access to them, because the defendant felt the fumes would damage the machinery which was locked in the shed. The defendant was fully aware of the danger of these compounds to children playing in the yard:

> "Q. Did it ever occur to you that children might get into the acids and get hurt?
>
> A. Well, it might occur to anybody else, but I store it just like the big companies do their acids. They keep them on the platform and things around.
>
> Q. I ask you if it occurred to you that children might come into the yard and be hurt.
>
> A. Yes.
>
> Q. That occurred to you?
>
> A. Sure." (Deposition, Thomas B. Child, p. 30.)

On or about the 17th of February, 1957, the plaintiff was attracted onto the premises by the statues, machinery, barrels, and other contents located thereon. He explored the contents of the barrel containing the explosive material by holding a lighted match or torch by the barrel opening. It thereupon exploded, causing the above described serious injuries.

Plaintiff, by his Guardian, filed suit against the defendants for damage. The defendants made a motion for Summary Judgment, the District Court granted said motion, and from that judgment the plaintiff appeals.

STATEMENT OF POINTS

Point I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AS:

(1) GENUINE ISSUES OF MATERIAL FACTS DO EXIST.

(2) QUESTIONS PECULIAR TO THE ATTRACTIVE NUISANCE DOCTRINE SHOULD BE TRIED.

(3) THE FACTS ALLEGED MUST BE CONSIDERED AND APPLIED IN A MANNER MOST FAVORABLE TO PLAINTIFF'S CAUSE OF ACTION.

Point II.

THE DEFENDANTS ARE LIABLE TO THE PLAINTIFF UNDER WHAT IS COMMONLY CALLED THE PLAYGROUND DOCTRINE.

Point III.

THE DEFENDANTS ARE LIABLE TO THE PLAINTIFF UNDER THE DOCTRINE COMMONLY KNOWN AS THE ATTRACTIVE NUISANCE DOCTRINE.

ARGUMENT

Point I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AS:

(1) GENUINE ISSUES OF MATERIAL FACTS DO EXIST.

(2) QUESTIONS PECULIAR TO THE ATTRACTIVE NUISANCE DOCTRINE SHOULD BE TRIED.

(3) THE FACTS ALLEGED MUST BE CONSIDERED AND APPLIED IN A MANNER MOST FAVORABLE TO PLAINTIFF'S CAUSE OF ACTION.

(1) In granting Summary Judgment to the defendants, Jack Alder and Robert R. Child, the trial court found all of the following facts: (See Record, page 81)

(a) The drum of Seal-Tex was not an unusual and extraordinary thing.

(b) Said drum was not dangerous per se, or if so there was no reason for said defendants to think it so.

(c) Said defendants did not know or had no reason to know the Seal-Tex was dangerous to children.

(d) The Seal-Tex did not attract the plaintiff onto the premises involved.

(e) The plaintiff used the Seal-Tex in an unordinary and unexpected way.

(f) The plaintiff was not one of tender years within the Doctrine of Attractive Nuisance.

(g) The plaintiff knew the Seal-Tex was dan gerous.

(h) The premises involved were not used as a playground, or, at least, said defendants didn't know so.

It is of great interest that the trial judge could conclude all these facts. For him to do so he must have had complete trust in the credibility of deponent Robert B. Child — and to the contrary had no faith whatsoever in the deponent plaintiff. It is fascinating that the trial judge could be so overwhelmingly persuaded of all these facts by a deponent who, as a civil engineer, first categorically denied any knowledge of the organic nature of asphalt and then in direct contradiction acknowledged that asphalt is made of sand and gravel mixed with an oil base. (Deposition, Robert R. Child, p. 13, lines 23 to 27)

In granting Summary Judgment to defendant Thomas B. Child, the trial judge found the same series of facts as recited above, plus the fact that defendant Thomas B. Child had no actual or constructive knowledge that the drum involved contained Seal-Tex, or that said product was stored on his premises. These findings are apparently based on the deposition of said defendant Child and again apparently prompted by implicit faith in the statements of said deponent. To believe that the yard of said defendant was not a playground, to believe that children did not go on the yard, to believe that the yard was not attractive to children and the Seal-Tex stored there not dangerous, and to believe that the plaintiff was not of tender years, one must completely ignore the fact

of the explosion, the deposition of the plaintiff, and the allegations of the complaint. It would seem impossible to conclude that no issue exists as to these material facts. It would also seem that the trial judge in awarding Summary Judgment in this matter considered the facts in a light most favorable to the defendants. And it would seem tragic that a boy, severely burned, both legs destroyed, and deprived forever of a normal life, should be denied at least the chance of a day in court to tell his story, because of such error by the trial judge.

Rule 56 (c) URCL reads in part as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

The trial judge must find that no genuine issue as to *any* material fact exists *and* that the moving party is entitled to a judgment as a matter of law. "If . . . there is a genuine issue as to a material fact, the case should go to trial." (*Moore, Federal Practice,* Section 56.04) "A summary judgment is a judgment in bar that results from an application of substantive law to facts that established beyond reasonable controversy." (Ibid, Section 56.11) "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." (*Weisser* v. *Mursam Shoe Corp.,* 1942, 127 F. 2d 344) "Under this rule (Rule 56(c)) it is clear that if there is any genuine issue as to

any material fact, the motion should be denied." (*Young* v. *Telornia,* 1952, 121 U. 646, 244 P. 2d 862) We submit that there are genuine issues as to all those facts found by the trial judge.

(2) "Here we start with the general proposition that issues of negligence, including such related issues as contributory negligence, are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner." (*Moore, supra,* Sect. 56.17 (42).) In the very case by which the Utah supreme court adopted the attractive nuisance rule (*Brown* v. *Salt Lake City,* 1908, 33 U. 223, 93 P. 570) the court indicated that should it be trying the facts it would have arrived at a different conclusion than that reached by the jury, but that the trial court was correct in charging the jury with questions as to the attractiveness of the danger, whether or not the alleged danger was in fact dangerous, whether defendant was responsible for the danger and whether or not the defendant should have foreseen that the danger might be injurious to children. Other jurisdictions have held similarly that the following are jury questions:

(a) The immaturity and mental capacity of the child. (*Missouri Pac. R. Co.* v. *Lester,* 242 S.W. 2d 714; *Keck* v. *Woodring,* 208 P. 2d 1133; *Moseley* v. *Kansas City,* 228 P. 2d 699; *Kentucky Utilities Co.* v. *Earles' Adminis.,* 22 S.W. 2d 929.)

(b) The dangerousness of the device causing the injury. (*Giddings* v. *Superior Oil Co.,* 235 P.

2d 843; *Kahn* v. *James Burton Co.*, 126 N.E. 2d 836.)

(c) The sufficiency of the care exercised by the owner. (*Giddings* v. *Superior Oil Co., supra; Ford* v. *Blythe Bros. Co.*, 87 S.E. 2d 879; *Svienty* v. *Penn. R. Co.*, 132 N.E. 2d 83; *Harris* v. *Mentes-Williams Co.*, 95 A. 2d 388.)

(d) The attractiveness of the danger to children. (*Kahn* v. *James Burton Co., supra; Ford* v. *Blythe Bors. Co., supra; Keck* v. *Woodring, supra; Verrichia* v. *Society Di M.S. Del Laxio*, 79 A. 2d 237.)

We submit that the questions involved in this case, when controverted, are the kinds of questions which should go to the trier of fact.

(3) Certainly the trial judge was obligated to consider the pleadings and other matters of record in a light most favorable to the plaintiff.

> "A Court should not direct a verdict in favor of a defendant unless the evidence is wholly lacking to prove some issue necessary to support the plaintiff's claim and unless no reasonable or logical inferences may be drawn by the jury based upon the evidence which would support the plaintiff's claim. That general rule has so often been stated by this and other Courts that it may be said to have become elementary." (Ellerbeck v. Continental Casualty Co., 63 U. 530, 227 Pac. 805)

In the Utah case of *Christiansen* v. *L. A. & S. L. R. R. Co.*, reported in 77 Utah 85, 291 Pac. 926, p. 90, the Court has this to say:

> "The evidence on these issues was in dispute,

but for the purpose of passing on defendant's motion for a directed verdict, the evidence must be considered and applied most favorable to plaintiff's cause of action. Grossbeck v. Lake Side Printing Co., 55 Utah 335, 186 P. 103. Plaintiff's evidence must be taken as true and every legitimate inference drawn in its favor. Mabetto v. Wolfe. (Cal. App. 289 P. 218)."

In the Utah case of *Robinson* v. *Salt Lake City,* reported in 37 Utah 520, 109 Pac. 817, pp. 527, 528 of the Utah Reports, the Supreme Court in deciding the propriety of a non-suit granted by the lower court, said:

> "True the evidence may not be overwhelming, nor even strong on some of the points, and it may even tend to show contributory negligence; but whether the evidence is strong or weak, or whether there is some evidence of contributory negligence or not, is not the test. The test is whether or not there is some substantial evidence in support of every essential fact which a plaintiff is required to prove in order to entitle him to recover. If the evidence and the inferences are of the character which would authorize reasonable men to arrive at different conclusions with respect to whether all the essential facts were or were not proven, the question is one of fact and not of law. This is so although the evidence on some points may be unsatisfactory or doubtful. (Brown v. Salt Lake City, 33 Utah, 242, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828.) This has so often been said by the courts that the rule has become elementary."

We submit that obviously the trial judge did not consider and apply the alleged facts in a manner most favorable to the plaintiff, that this was error, and that this appellate court must now do so.

Point II.

THE DEFENDANTS ARE LIABLE TO THE PLAINTIFF UNDER WHAT IS COMMONLY CALLED THE PLAYGROUND DOCTRINE.

Where a person maintains a yard and it is known to be a place where children habitually play, whether by permission or not, persons knowing of this fact must use reasonable care to keep the area safe for children who may come upon it, or to take reasonable steps to exclude them from the property. The placing upon the property of any objects which a reasonable person might know could injure children playing on such property, is negligence.

Under the Playground Rule, if an owner or person in control of property knows, or has reason to know that children habitually play upon his land to the extent that it becomes known as a playground, he is bound to exercise reasonable care to see that the premises are safe for the purpose or must at least warn of known dangerous conditions. (*Personal Injury, Actions—Defense—Damages,* by Louis R. Frumer and R. L. Benoit, Section 103(2).)

If we examine the deposition of Thomas B. Child, the owner of the premises on which the accident occurred, and consider the testimony and record most favorable to the plaintiff and against the defendant, it is difficult to come to any other conclusion except that the premises had been made by the defendant into a park, at least semi-public. The defendant took great pride in his

alleged works of art which he carved from stone and arranged at various points around the property. He was flattered by the newspaper publicity and admits that the place was a point of interest to many, many people in the area, both young and old. The testimony of Thomas B. Child cited in the Statement of Facts to the effect that he chased children from the yard almost constantly, or told them that they had no right to be therein, is ample evidence that the defendant knew of the propensity of children in the neighborhood to be attracted into the yard and to play therein, and yet he never locked the gate or took precautions to exclude them from the yard. He would even have us believe that little children would procure wire cutters and go through the fence in order to get into the yard. If this is true, the attraction of the premises must have been overpowering indeed:

"Q. How big were the holes?

A. Well, just big enough for them to get through.

Q. How did they break through? Did they break the wire in the fence?

A. Yes, break the wire and unwire it from the steel posts.

Q. What did they do, cut it with clippers?

A. Well, sometimes, and sometimes they undo the fastenings and things." (Deposition, Thomas M. Child, p. 35, lines 2-9.)

"Q. Do you mean to tell me these little children cut through this quarter-inch fence periodically?

A. Well, some of it isn't quarter-inch. Some of it was patched out over to the other building

> by the neighbor's fence, and they had toggled that over there through it so that some of the fence was built a long while and toggled out over to the other buildings, which wouldn't be in my property at all, but it was fenced and was blocked off." (Deposition, Thomas B. Child, p. 35, lines 28-30; p. 36, lines 1-5.)

The picture of little children armed with wire cutters cutting their way into the defendant's yard in order to play among the various items of curiosity to be found there is, of course, unbelievable. However, it does demonstrate that the defendant was fully aware of the powerful attractive features of the property and of the propensity of little children to come onto the property to play.

The boy, Eddie Hoogland, had on many occasions played on the premises among the many interesting and curious objects to be found thereon, and on the date of the accident entered the premises through a gap in the fence and observed a drum containing a quantity of Seal-Tex, an explosive compound. The plaintiff in attempting to see what was contained in the barrel which did not have a cap on it, lit a match, and the resultant explosion caused the loss of both legs and other permanent injuries.

The affidavit in opposition to the defendants' Motion for Summary Judgment, as well as the depositions, raised an issue of fact as to whether or not defendants should have been aware that the property was used as a playground by children in the area, and should have, therefore, taken precautions against storing on the prop-

erty materials that might injure children playing thereon. These are issues for a finding of fact and are not issues that can be determined on a Motion for Summary Judgment. Even the credibility of the defendants' statements in their affidavits and depositions is a question for the jury and their statements have been traversed.

> "Here we start with the general proposition that issues of negligence, including such related issues as contributory negligence, are ordinarily susceptible to summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. . . .
>
> "If in the above situation there have been, or in any situation there is, a real issue as to the credibility or the moving party does not satisfy his burden of clearly establishing that there is no genuine issue of material fact, then under basic principles, the motion for summary judgment should be denied." (Moore, Federal Practice, Sec. 56.17 (42).)

Point III.

THE DEFENDANTS ARE LIABLE TO THE PLAINTIFF UNDER THE DOCTRINE COMMONLY KNOWN AS THE ATTRACTIVE NUISANCE DOCTRINE.

Ordinarily a person need not secure his property against excursion of persons not invited upon the property even if these persons are children of immature judgment. The exception to this rule is that if an owner maintains on the property any object or thing which a reasonably prudent person should foresee might attract children upon the premises then, unless he takes reasonable

precautions to secure the premises against the intrusion of children attracted by the objects upon the property, he is not entitled to set up as a defense the trespass of the child.

According to *Restatement of Torts,* Section 339, the doctrine is applicable if: (1) the owner or person in possession knows or should know that children are likely to trespass on place where the condition is maintained; and (2) the condition is one which the owner or possessor knows and realizes or should know and realize involves unreasonable risk of harm to children.

Under the facts of this case it is hard to conceive of a situation which more strongly impels the application of the Attractive Nuisance Doctrine. The defendant had created a park of the property, decorated with curious and unusual carvings and stone work, the interpretation and meaning of which was a puzzlement to most of those who came upon the property, and it was well known to him and his family that the premises had drawn people from all over the area to observe and wonder at the curiosities which the defendant had created on the premises. Certainly, it is a question for the jury as to whether or not these things would excite the natural curiosity of children who appreciate no property lines when they are moved by the spirit of adventure to explore and examine such an intriguing property as the defendants made of this one. The defendant did not secure his premises, and indicates in his deposition that he constantly had to chastise children and advise them

that they could not play on the property. Even with this knowledge he did not even close the gate, and left on the property acids and other dangerous things that the most reckless person would appreciate created a danger to the children playing thereon. (Deposition, Thomas B. Child, p. 22, lines 18-20.)

"Q. You have chased a lot of kids out of your yard?

A. Yes, sir. Any time they are in there and I see them, out they go."

"Q. Why don't you lock your gate?

A. Because I use my yard for other things, and we come in from the back rather than opening the gates and coming in from 8th East and having the traffic next to my house.

Q. Did you have a lot of traffic?

A. Sure. That's how we haul our scaffold and things into the shed and come in and take the stuff, and that is the way we use them.

Q. You don't make any effort to close your gates after you go in?

A. No." (Deposition, Thomas B. Child, p. 23, lines 6-16.)

That the defendant had extended an implied invitation to all persons who wished to come upon the premises and view the many curiosities, can scarcely be denied. (Deposition, Thomas B. Child, p. 24, lines 3-30.)

"Q. And these stone monuments that you have cut out are in your yard?

A. Yes.

Q. And they are there for exhibition purposes, aren't they?

A. Not particular. I have never asked anybody to come there to see my stuff. If they want to come, it is all right. If they do not, it is all right because it is always in a state of experimentation, and I am not trying to induce anybody to come into my yard.

Q. You are kind of proud to have people come to look at those stone monuments you have carved out, aren't you?

A. In a general way. I am like anybody else. I like — when I do something that is noteworthy, I am willing to have it expressed.

Q. You have never put limitation on the age of the people that can come and walk around the yard and look at those things, have you?

A. No. No, sir.

Q. So you have seen people of all ages come to look at your work on these monuments, haven't you?

A. Yes.

Q. Over a period of time?

A. Yes.

Q. In fact, the newspapers have run quite a story on your yard and the spectacular monuments, carvings that have been made in there?

A. They have run a story a time or two.''

The defendant having admitted that he held the property out to all who desired to come and enter and examine the premises certainly has taken upon himself an obligation to keep those premises safe, and the storing of acids

and chemicals thereon can scarcely meet the standard of care under these circumstances. In any event, this would be a matter for the jury to determine. If the Attractive Nuisance Doctrine does not apply in this case it is because there is no need for its application, the plaintiff being one of a group of the public who occupy the status of invitees to enter upon the property.

The Attractive Nuisance Doctrine is applicable in Utah, as cited in *Brown* v. *Salt Lake City, supra,* wherein the Court stated that if the attractive nuisance is artificial, uncommon, dangerous and attractive, and may, with reasonable effort and expense, be guarded and made reasonably safe, then the duty to make it so may not be disregarded.

The defendants in arguing to the court below contended that the object itself must be the thing that lures the child upon the premises in order for the Attractive Nuisance Doctrine to apply, and urged the court that a barrel with an opening in the top was not such an attractive nuisance. While it is conceded that the doctrine is not treated the same by all courts, the better reasoned decisions do not make any such fine distinction, and hold that it is sufficient that the defendant could reasonably anticipate that children might be lured upon the property and then injured by some object thereon. In the case of *Lone Star Gas Co.* v. *Parsons,* 14 Pac. 2d 369, the court pointed out that it is immaterial whether the object itself lured the infant upon the premises so long as the owner of the premises could reasonably anticipate that a child would

be attracted thereon, and once upon the premises would observe and be attracted to the object which actually injured him.

Also, in *Little* v. *McCord,* 151 S.W. 835, the court pointed out that if children are attracted upon the premises because of some existing attraction, a condition exists which the owner cannot ignore in casting upon the premises explosive substances which the children would be attracted to after entering the premises.

To the same effect is *Vills* v. *Cloquet,* 138 N.W. 33 where a child came in contact with explosives which he observed after he was attracted on to the premises. Defendants urged to the court below that by reason of the plaintiff's age the Attractive Nuisance Doctrine could not be applied. However, as set forth in the affidavit in opposition to the Motion for Summary Judgment, the mental age of the plaintiff was less than eight years of age, and this fact is amply demonstrated by the deposition of the child. The cases hold that it is not a matter of chronological age, but a question of whether or not the child was of sufficient maturity for him to appreciate the implication of his actions, and this question is one for the jury. *Keck* v. *Woodring, supra; Powers* v. *Harlow,* 19 N.W. 257.

CONCLUSION

The defendants in this motion seek to have this Court rule as a matter of law that one who maintains a yard containing the most unusual curiosities and invites

the public to come thereon to enjoy them and who knows that children frequently use the yard as a playground, cannot be liable as a matter of law for storing thereon dangerous substances that any reasonable person should know would be attractive to children. We respectfully submit that this is not the law, and that the issues in this case should be submitted to a jury and that to sustain the lower court's granting of the Motion for Summary Judgment would establish a principle that would be contrary to law and the public interest.

Respectfully submitted,

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